



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

February 19, 2004

Ms. April M. Virnig  
Taylor Olson Adkins Sralla Elam, L.L.P.  
6000 Western Place, Suite 200  
Fort Worth, Texas 76107-4654

OR2004-1219

Dear Ms. Virnig:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 195583.

The City of Richland Hills (the "city") received a request for information "relating to a possible retail development in the vicinity of Creek Trail Park." You claim that the requested information is excepted from disclosure under sections 552.104, 552.105, 552.107, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must consider whether the city has complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301 requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b).

You inform us that the city received the request for information on November 7, 2003. However, you did not raise section 552.107 as an exception to disclosure until December 2, 2003. Consequently, you failed to claim this exception to disclosure within the ten-business-day period mandated by section 552.301(b) of the Government Code. In failing to comply with section 552.301, the city has waived its claim under section 552.107(1). *See* Gov't

Code § 552.301; Open Records Decision Nos. 676 (2002) (governmental body may waive section 552.107), 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107), 522 at 4 (1989) (discretionary exceptions in general); *see also* Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Therefore, the city may not withhold any portion of the submitted information under section 552.107(1).

We next address your claim under section 552.104 of the Government Code. Section 552.104 excepts from public disclosure “information that, if released, would give advantage to a competitor or bidder.” This exception protects a governmental body’s interests in connection with competitive bidding and in certain other competitive situations.<sup>1</sup> *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. The governmental body must first demonstrate that it has specific marketplace interests. *See* Open Records Decision No. 593 at 4 (1991) (governmental body that has been granted specific statutory authority to compete in the private marketplace may demonstrate marketplace interests analogous to those of a private entity). Second, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

In this case, you inform us that the city has received a proposal for possible development within the city. You state that “[t]he proposed development would benefit the [c]ity greatly in a number of ways, including generating significant tax revenue, creating jobs for local citizens, and encouraging further commercial development in the [c]ity.” Further, you opine that “release of the submitted information would place the [c]ity at a disadvantage with other competing cities,” and explain that “three other area cities are already competing for this same project.” You also state that “if the requested information is released, another area city will in all likelihood attempt to match or exceed the incentives” the city has offered. Based upon your representations, we find that the city has sufficiently demonstrated that it has specific marketplace interests in this instance and that release of the submitted information would harm the city in a specific competitive situation. *See* ORD 593. Thus, we conclude the city may withhold the submitted information based on section 552.104 of the Government Code.<sup>2</sup>

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<sup>1</sup>As you do not indicate that the information in question relates to a competitive bidding situation, we do not consider this aspect of section 552.104.

<sup>2</sup>As our ruling is dispositive, we do not address your remaining claims.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Nettles", written in a cursive style.

Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 195583

Enc. Submitted documents

c: Mr. John Kirsch  
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(w/o enclosures)